PP

v.

IDZHAAM SHAFIE

HIGH COURT MALAYA, ALOR STAR
MOHD SOFIAN ABD RAZAK JC
[PJK NO: 45-16-2004]
28 MARCH 2006

CRIMINAL PROCEDURE: *Sentence - Possession of cannabis - Possession of 204 grammes of cannabis - Plea of guilty - Appropriate sentence - Dangerous Drugs Act 1952, ss. 6, 39A(2)*

The accused had pleaded guilty to the amended charge of possession of 204 grammes of cannabis under s. 6 Dangerous Drugs Act 1952 ('the Act'). Before the learned Judicial Commissioner, in mitigation of the sentence, the accused pleaded for leniency on the grounds, principally, that the offensive drug was only 4 grammes more in weight than the prescribed amount for presumption of trafficking under s. 37(vi) of the Act, and further that, notwithstanding that he had a previous conviction for an offence under s. 15A of the Act, the offence was committed ten years ago and should therefore be disregarded. The prosecution sought for a deterrent sentence and the issue that confronted the court was what was the most appropriate sentence to be passed under the circumstances.

Held:

(1) The most important factor to be considered in passing sentence is that of public interest and the protection of the society at large. (para 15)

(2) The court takes judicial notice of the increasing number of crimes relating to dangerous drugs. The court also takes notice of the concern shown by the legislature when it increased the punishment for offences under s. 39A(2) of the Act from a maximum of 14 years' imprisonment to life imprisonment, from a minimum term of imprisonment of three years to five years and from the minimum six strokes of the rotan to ten strokes. It is clear that unless the court takes a firm stand in offences of this nature, such of Parliament's intention as embodied in s. 39A(2) of the Act may never materialize. (paras 20, 21, 22 & 23)

(3) The dangerous drugs here exceeds 3 times the minimum weight of 50 grammes provided under s. 39A(2)(f) of the Act. The weight of the cannabis, therefore, did not suggest that it was for the accused's own consumption. Clearly, the amount of damage done if the cannabis found its way into the public is unthinkable. It would cause hundreds of untold miseries and perhaps death. (paras 25 & 29)

(4) As a general principle, the accused's character and antecedent can be referred to in determining the sentence to be passed. In the instant case, the gap between his previous conviction and the current offence is ten years. What this showed is that the accused had not been rehabilitated by the sentence. Instead, he committed a more serious offence under the Act. (para 33)

(5) The maximum sentence the court could impose is an imprisonment for life or for a term which shall not be less than five years and shall also be punished with whipping of not less than ten strokes of the rotan. The court's view is that, if the accused had claimed trial to the amended charge and convicted, the court would have imposed a sentence of 15 years' imprisonment. In view of his plea of guilty, the court thus deems it proper to give a discount of one-third of that sentence. Accordingly, he is sentenced to ten years' imprisonment from the date of his arrest and ten strokes of the rotan. (paras 37, 38 & 39)

[Order accordingly.]

Case(s) referred to:
Cobiac v. Liddy [1969] 119 CLR 257 ***(refd)***
Melvani v. PP [1971] 1 MLJ 137 (1) ***(refd)***
Mohamad Abdullah Ang Swee Kang v. PP [1987] 2 CLJ 405; [1987] CLJ (Rep) 209 SC ***(refd)***
PP v. Loo Choon Fatt [1976] 2 MLJ 256 ***(refd)***
PP v. Mohd Tajudin Ismail [1998] 7 MLJ 542 ***(refd)***
PP v. Ravindran & Ors [1993] 1 MLJ 45 ***(refd)***
PP v. Sulaiman Ahmad [1992] 4 CLJ 2283; [1992] 3 CLJ (Rep) 447 HC ***(refd)***
Rex v. Grondkowski [1946] All ER 560 ***(refd)***
R v. Kenneth John Ball [1951] 35 Cr App R 164 ***(refd)***
Sau Soo Kim v. PP [1975] 2 MLJ 137 ***(refd)***
Soosainathan v. PP [2001] 6 CLJ 44 HC ***(refd)***
Tan Lay Chen v. PP [2000] 4 CLJ 492 HC ***(refd)***

A *Tia Ah Leng v. PP [2004] 4 CLJ 77 CA* ***(refd)***
Vaughan v. Lennie [1981] VR 255 ***(refd)***
Yusmarin Samsudin v. PP [1999] 4 CLJ 391 CA ***(refd)***

Legislation referred to:
B Dangerous Drugs Act 1952, ss. 6, 12(2), 15(A), 37(vi), 39A(2)(a), (f), 39B(1)(a), (2)
Penal Code, s. 75

For the applicant - G Ravishankar; M/s R Shankar Gandhi & Assoc
For the respondant - TPR Nurhafizza Azizan; AG's Chamber

C *Reported by WA Sharif*

JUDGMENT

D **Mohd Sofian Abd Razak J:**

[1] The accused was originally charged for trafficking of dangerous drugs to wit, 204 grammes of cannabis, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the E Act) and punishable under s. 39B(2) of the act. The only penalty prescribed by the Act is death. Fortunately for the accused however, before the trial could commence, the learned deputy public prosecutor, tendered on behalf of the public prosecutor an amended charge, exh. P3 to one of possession F under s. 6 and punishable under s. 39A(2) of the Act which carries an imprisonment for life or for a term which shall not be less than five years and shall also be punished with whipping of not less than ten strokes.

[2] The amended charge:
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> Bahawa kamu pada 20 Jun 2003, pada jam lebih kurang 12.05 pagi di 321 di Hotel Seberang Perak, Jalan Kilang Ais, Alor Setar di dalam daerah Kota Setar, di dalam Negeri Kedah Darul Aman telah didapati memiliki dadah berbahaya iaitu cannabis seberat 204 gram dan oleh yang demikian kamu telah melakukan satu H kesalahan di bawah s. 6 Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s. 39A(2) Akta yang sama.

[3] The amended charge was read and explained to the accused who having understood the amended charge and the nature and I consequences of pleading guilty to the amended charge, nevertheless, pleaded guilty to the charge.

[4] The accused also admitted the written facts relating to the commission of the offence exh. P4 as being true and the exhibits tendered by the prosecution, namely Police Report No: 10956/03 as exh. P5, Sketch Plan and Key as exh. P6A and P6K respectively, four copies of photograph of the scene exh. P7A-D, four copies of photograph of exhibits-exhibits P8A-D, Chemist Report No: Makmal (PG) FOR 2002/03-0 dated 2 October 2003 exh. P9, one black colour helmet exh. P10, one envelope with sticker (PG) FOR 2002/03-0 exh. P11, small black bag exh. P12, 1 small transparent plastic wrapper containing an aluminium foil exh. P13, 1 black plastic bag exh. P14, plant material in the plastic bag with marking No. Makmal (PG) FOR 2002/03-0 Jabatan Kimia exh P15.

[5] The court found the accused guilty as per the amended charge and sentenced the accused to 10 years imprisonment from the date of his arrest, that is 20 June 2003. The court further ordered that the accused be given ten strokes of the rotan.

[6] The accused is dissatisfied with the sentence and has filed a notice of appeal. In so far as the punishment on the strokes is concerned the accused got the minimum strokes and therefore the appeal is whether the sentence of ten years imprisonment from the date of his arrest was manifestly excessive.

[7] Before passing sentence the court considered the accused's plea in mitigation made on his behalf by his learned counsel, En. Ravishankar and the submissions of the learned DPP Cik Nurhafizza Azizan.

[8] In mitigation, En. Ravishankar submitted that the accused had pleaded guilty and the court in assessing sentence ought to consider such a plea as a mitigating factor (*Melvani v. PP* [1971] 1 MLJ 137 (1), and thereby saved the time of the court and of others involved in the case *(Sau Soo Kim v. PP* [1975] 2 MLJ at p. 137). He further submitted that a plea of guilty was a mitigating factor even if the offender was shown to be a hardened criminal (*PP v. Sulaiman bin Ahmad* [1992] 4 CLJ 2283; [1992] 3 CLJ (Rep) 447).

[9] The accused was at the time of his arrest aged 32 years, married with two children aged eight years and six years respectively and also looking after his aged mother of 70 years old. It was further submitted that the accused was only in possession of 204 grammes of cannabis which is 4 grammes more in weight

than the prescribed amount for the presumption of trafficking under s. 37(vi) of the Act that is 200 grammes or more in weight of cannabis.

[10] The accused had expressed his remorsefulness over his action and gave his undertaking to the court that he will not be involved in any offence in future.

[11] En. Ravishankar had further urged the court to impose a lenient sentence on the accused and submitted to the court a list of cases with the particulars of sentences for the same offences as committed by the accused as decided by the High Court in Alor Star namely:

(i) Alor Star Criminal Trial No: 45-1-00
PP v. Zulkifli bin Rejab
Weight: 5749 grammes of ganja
Sentences: 10 years from date of arrest and 10 strokes
Coram: Dato' Wan Adnan bin Muhamad J

(ii) Alor Star Criminal Trial No: 45-12-01
PP v. Mohd Shafri bin Hj. Idris
Weight: 266.6 grammes of cannabis
Sentences: 7 years from date of arrest and 10 strokes
Coram: Dato' Hasan bin Lah J

(iii) Alor Star Criminal Trial No: 45-32-01
PP v. Bakarin bin Ahmad
Weight: 376 grammes of cannabis
Sentences: 8 years from date of arrest and 10 strokes
Coram: Dato' Zainal Adzam bin Abd. Ghani J

[12] En. Ravishankar referred the court to the case of *PP v. Ravindran & Ors* [1993] 1 MLJ 45 where Visu Sinnadurai J held that:

> the court should also have regard to certain accepted principles or guideline so as not to have too great a disparity in sentence for the same offence. These guidelines were: discount or credit for the plea of guilty; comparison of sentences in other Court in other

cases for a similar offence; disparity of sentence amongst accused persons and mitigating factors relevant to the present case. It is an accepted rule of practice that an accused should be given credit or discount for pleading guilty. This is because public time and money will be spared if an accused admits his guilt. The credit or discount to be given to an accused person is not on the maximum sentence imposed by law but rather on a sentence which would have been imposed on the accused if he had claimed trial and been found guilty.

[13] The learned DPP Cik Nurhafizza Azizan in her submission however underlined the seriousness of the offence and the public interest, and asked for an appropriate but deterrent sentence to be passed. Reference was made to the case of *Tia Ah Leng v. PP* [2004] 4 CLJ 77 where she submitted that the exceptions to the general rule that when imposing a sentence, the court should take into consideration the fact that an accused person who has pleaded guilty be given certain credit and discount does not include offences under the Dangerous Drug Act 1952. The learned DPP further submitted that the accused had one previous conviction under s. 15(A) of the Act (exh. P16) where upon En. Ravishankar informed the court that it was an offence committed in 1996 almost ten years ago and when the accused was unmarried.

[14] Before passing sentence the court considered the accused's plea in mitigation made on his behalf by his learned counsel and the submissions of the learned DPP.

[15] The first and most important factor which the court must take into consideration before imposing any sentence is that of public interest and the protection of the society.

[16] In a well known and oft quoted case of *R v. Kenneth John Ball* [1951] 35 Cr. App R 164 where Hilbery J had stated:

In deciding the appropriate sentence a court should always be guided by certain consideration. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible.

Such a sentence may also deter the particular criminal from committing crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served and best

A served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leave it to the court to decide what is, within that maximum, the appropriate sentence for each crime, but in regard to each criminal, the court has the right and the duty to decide whether to be lenient or severe.

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[17] Lord Goddard LCJ in *Rex v. Grondkowski* [1946] All ER 560 had this to say:

C The judge must consider the interest of justice as well as the interest of the prisoners. It is too often nowadays thought, or seems to be thought, that the interests of justice means only the interest of the prisoners.

[18] Thus it is clear from the above passages that the court takes D into consideration the element of public interest as being the foremost in mind when sentencing.

[19] In the case of *Yusmarin bin Samsudin v. PP* [1999] 4 CLJ 391, Siti Norma Yaakob JCA (as she then was) said:

E The principles of sentencing have long been entrenched and well settled in our criminal law jurisprudence and a court seized with such jurisdiction is empowered to take into account the following considerations:

(1) the extent and seriousness of the offence committed;

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(2) the guilty person's antecedents; and

(3) the public interest factor.

[20] The court takes judicial notice of the increasing number of G crime relating to drugs as news of such offences are constantly being reported in the media.

[21] It has to be noted that the legislature had thought it fit to increase the punishment for offences under s. 39A(2) of the Act, from a maximum of 14 years imprisonment to life imprisonment and H the minimum of terms of imprisonment from three years to five years and the minimum strokes increased from six to ten strokes. The legislative exercise therefore denotes the concern of the government in combating the drugs menace in the country.

I **[22]** In *PP v. Loo Choon Fatt* [1976] 2 MLJ 256 Hashim Yeop Sani J (as he then was) referred to this phenomena as the degenerating effect of the misuse of dangerous drugs and the attendant dangers it has posted to society itself.

[23] I share the same sentiment as expressed by Hashim Yeop Sani J (as he then was) in that unless the court takes a firm stand in such offences, the intention of Parliament as embodied in s. 39A(2) of the Act may not materialize.

[24] The court takes the view in that the possession by the accused of 204 grammes in weight of cannabis is an offence under s. 39B(1)(a) and punishable under s. 39B(2) if the learned DPP had not tendered an amended charge under s. 6 and punishable under s. 39A(2) of the act.

[25] The amount of dangerous drugs in this case exceeds 3 times the minimum weight of 50 grammes as provided under s. 39A(2)(f) of the act.

[26] In the case of *Soosainathan v. PP* [2001] 6 CLJ 44 Augustine Paul J (as he then was) stated:

> It has been repeatedly stressed that in cases involving possession of drugs the weight of the drugs found on a person plays a significant role in assessing sentence (see *Zaidon Shariff v. PP* [1994] 4 CLJ 441).

[27] In the case of *Soosainathan (supra)* the accused was in possession only 0.07 grammes of monoacetylmorphine and it was suggested that the possession of the drugs was for his own consumption.

[28] However in an earlier case of *PP v. Mohd Tajudin bin Ismail* [1998] 7 MLJ 542 Augustine Paul JC (as he then was) held that the accused had been found in possession of 429.7 grammes of cannabis. This is not a small amount by virtue of the minimum weight to attract the application of the section under which he was charged. It is also obvious that the accused had no defence.

[29] In the case before the court, the accused was found to be in possession of 204 grammes of cannabis which does not suggest that it was for his own consumption. The court is of the view that the amount of damage done if the cannabis found its way into the public at large is unthinkable. It would cause hundreds of untold miseries of drug addicts and perhaps death. There is always no shortage of buyers for this 'sought after commodity' which is like signing their own death warrants. Therefore I see no merit in the submission of the learned counsel on this point.

[30] The court also considered the previous conviction of the accused under s. 15 of the Act, which was committed ten years ago and whether it is relevant in the sentencing process.

[31] Previous convictions are only relevant for two reasons namely, it defeats any claim or inference that the accused is a first offender or is of prior good character, for the purpose of any general plea in mitigation (see *Cobiac v. Liddy* [1969] 119 CLR 257). Secondly, whether the previous conviction is relevant for the purpose of subjecting the accused to any statutory requirement to an increased punishment for the second or subsequent offences (see *Vaughan v. Lennie* [1981] VR 255).

[32] However, the Dangerous Drugs Act 1952 does not have a provision for an increased punishment for the second or subsequent offences unlike the provision in s. 75 of the Penal Code when an offender has previously been convicted of an offence under Chapter XII or under Chapter XVII of the Code.

[33] The court takes the view that as a general principle of sentencing the accused's character and antecedent can be referred to in determining the sentence to be passed on the accused. In the case before the court, the gap between previous conviction and the current offence is a ten year old gap, however the issue to be considered is what positive steps had been done by the accused to rehabilitate himself. I am of the view that the accused had not rehabilitated himself, instead had committed a more serious offence under the act. The court should strike a balance between public interest and the interest of the accused.

[34] With regard to the plea of guilty by the accused, there is no automatic rule that a guilty plea on its own entitles an accused to a lesser punishment. The power of sentencing is a discretionary one and it depends on the facts of each case. The court may refuse to give discounts in sentences as can be seen in the case of *PP v. Tia Ah Leng (supra)* where the accused pleaded guilty to an offence under s. 12(2) of the Dangerous Drugs Act 1952 punishable under s. 39A(2) thereof for having been in possession of 13,749.8 grammes of heroin. That unusually large amount of dangerous drugs was about 2,749 times the minimum weight of five grammes prescribed under s. 39A(2)(a) of the act. The High Court refused to treat his plea of guilty as a mitigating factor, instead sentenced the accused to life imprisonment, the maximum sentence provided for the offence.

[35] At this juncture it is useful perhaps to consider a passage by Augustine Paul J (as he then was) in *Tan Lay Chen v. PP* [2000] 4 CLJ 492:

> It must not be overlooked that the general rule is that an accused should be given a lesser punishment for pleading guilty. There can, as I have said, be a departure from this general rule. However, there must be good reasons for doing so. In that event the reasons for such departure must be kept in mind. If, therefore, a sentence is imposed without taking into consideration a guilty plea then the reasons for doing so must be explained by the sentences This is because an accused person expects the general rule to operate in his favour when he pleads guilty. The grounds of judgment must therefore show why the guilty plea cannot, on the facts of the case, be considered as a mitigating factor.

[36] The court had also taken into consideration the fact that when an accused person had pleaded guilty he is entitled to a discount between one quarter and one third of the sentence. In *Mohamad Abdullah Ang Swee Kang v. PP* [1987] 2 CLJ 405; [1987] CLJ (Rep) 209 Mohamad Azmi SCJ in delivering the judgment of the court said:

> It is generally accepted that the extent of the reduction on account of a plea of guilty would be between one-quarter and one-third of what otherwise would have been the sentence.

[37] In the case before the court the accused is charged under s. 6 and punishable under s. 39A(2) of the act. The maximum sentence the court could impose is an imprisonment for life or for a term which shall not be less then five years and shall also be punished with whipping of not less than ten strokes.

[38] However, the court is of the view that if the accused had claimed trial to the amended charge, the court would have imposed on the accused a sentence of 15 years imprisonment.

[39] In view of the accused's plea of guilty the court is of the opinion that the right and proper sentence having given him a discount of one-third of that sentence, accordingly sentenced the accused to a term of ten years imprisonment from the date of his arrest and ten strokes of the rotan in the hope that 'his memory of the clanging of prison gates' will keep him from this crime in the future.